STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 10,788
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals the decision of the Department of Social Welfare denying his application for Food Stamps and Fuel Assistance due to excess resources.

FINDINGS OF FACT

1. The petitioner is a sixty-four-year-old man who applied for Food Stamps and Fuel Assistance in September of 1991. He had previously received these benefits but they were terminated in October of 1990 when the Department discovered his name on at least two bank accounts which had not been reported to the Department.

2. One of these bank accounts was a certificate of deposit account which contained $4,918.00 and was labeled "B.F.W. [the petitioner] tr. for T.M.W. [the petitioner's grandson]". The certificate was opened in October of 1990 and the Massachusetts bank in which it was held took the position that the titling used by the petitioner meant that it could pay T.W. only if the petitioner died. Interest earnings were paid under the petitioner's social security number.

3. Based on this information, the Department concluded that the petitioner continued to have access to

resources in excess of the $3,000.00 limit and denied his application on October 1, 1991.

4. The funds in the certificate of deposit came from $4,200.00 given to the petitioner by his mother in the mid 1970's shortly before her death. The petitioner originally put the money in an account in both his and his mother's name. After his mother's death, the petitioner, who then was "well-set" financially and did not want to use the funds for himself, decided that he would set up a college education account for his young grandson. He told the bank of his intention and they set up the account for him. The petitioner did not report the account as his resource to the Department because he feels it belongs to his grandson.

5. The petitioner told his grandson and his family of the existence of the account about ten years ago but did not tell him how much was in the account or give them money from it even though the grandson's family experienced hard times. The petitioner wanted the money saved for a big event such as college or marriage. From time to time, the petitioner has withdrawn interest for his own use, particularly when he was burned out of his home some ten years ago. Of a total of about $800.00 withdrawn from the account, the petitioner has repaid approximately half and feels he owes the remainder but is currently unable to repay it. The petitioner claims he has never touched the principal in the account and that he reviewed his withdrawals with the bank to insure that he was not invading the principal.

6. Following his denial, the petitioner's attorney arranged for the bank to retitle the account as "B.F.W. custodian FBO T.M.W. under the Massachusetts Uniform Transfer to Minors Act" so that it would appear under T.M.W.'s social security account and be paid directly to T.M.W. on his twenty-first birthday. The Department agreed that on the day following the above change, the resource would no longer be considered available to meet his needs. However, the petitioner was asked to file a new application at that time. The change was made on December 11, 1991.

ORDER

The Department's decision is affirmed.

REASONS

Under the Department's Food Stamps and Fuel Assistance regulations households which contain elderly members (over age sixty) which have resources available to them in excess of $3,000.00 are not eligible for benefits. F.S.M. ə 273.8(b), W.A.M. ə 2903.1. Both programs specifically include liquid resources such as money in savings accounts or certificates of deposit in the definition of resources. F.S.M. ə 273.8(c)(i), W.A.M. ə 2903.2. Both programs also specifically exclude resources which are "not accessible" to the family because they are placed in a trust. F.S.M. ə 2903.2, W.A.M. ə 2903.2. The Food Stamp regulations define trust with some specificity:

> Resources having a cash value which is not accessible to the household, such as but not limited to,

irrevocable trust funds, security deposits on rental property or utilities, property in probate, and real property which the household is making a good faith effort to sell at a reasonable price and which has not been sold. The State agency may verify that the property is for sale and that the household has not declined a reasonable offer. Verification may be obtained through a collateral contact or documentation, such as an advertisement for public sale in a newspaper of general circulation or a listing with a real estate broker. Any funds in a trust or transferred to a trust, and the income produced by that trust to the extent it is not available to the household, shall be considered inaccessible to the household if:

i The trust arrangement is not likely to cease during the certification period and no household member has the power to revoke the trust arrangement or change the name of the beneficiary during the certification period:

ii The trustee administering the funds is either:

A. a court, or an institution, corporation, or organization which is not under the direction or ownership of any household member, or

B. an individual appointed by the court who has court imposed limitations placed on his/her use of the funds which meet the requirements of this paragraph:

iii Trust investments made on behalf of the trust do not directly involve or assist any business or corporation under the control, direction, or influence of a household member, and

iv The funds held in irrevocable trust are either:

A. established from the household's own funds, if the trustee uses the funds solely to make investments on behalf of the trust or to pay the educational or medical expenses of any person named by the household creating the trust, or

B. established from non-household funds by a non-household member.

F.S.M. ə 273.8(e)(8)

The petitioner here does not argue that he meets the

formal definition of "trust" in the above regulation. The facts indeed would not support such an argument as the "trust" created by the petitioner does not meet the first two elements in that it is not irrevocable, and not administered by someone outside of the household. The petitioner does argue, however, that the Department is required under the federal regulations at 7 C.F.R. э 273.8(e)(8)[1] to determine whether the account is actually accessible to him even if it does not meet the definition of "trust".

It does not appear that the Department disagrees with the petitioner's proposed standard for analyzing the account. In fact, the Department has agreed that the new account set up by the petitioner makes the money inaccessible to him[2] even though it does not appear to meet the definition of "trust". The Department's disagreement with the petitioner is over his actual ability to access and use the funds in the account.

The Board has held frequently and consistently that resources are only countable for virtually any assistance program if they are actually available to meet need. Fair Hearings No. 7,197, 8,501, and 10,671. Actual availability requires an analysis of whether the petitioner knows of the resource, has the ability to liquidate and/or obtain the resource and has the legal authority to use the resource for his or her benefit. In this case, the petitioner knew of

the existence of the account because he set it up. The evidence also shows that he had the unrestricted ability to withdraw funds from the account as he chose and that he did choose to do so on some occasions. Although he says he never invaded the principal, there was no evidence presented by the petitioner that the bank or his grandson could have prevented him from doing so. It appears from the evidence that the petitioner had complete control over all deposits and withdrawals.

Finally, the petitioner presented no evidence that he did not have the legal authority to use any or all of the funds in the account. While the petitioner appears to have felt morally constrained not to use the money in the account, the evidence presented showed that 100% of the money in the account was contributed from funds owned by him. The evidence does not show that a gift of the money to the grandson was ever completed so as to create a present exclusive property right in the grandson to all or part of the account. The petitioner, and the petitioner alone was reported to the I.R.S. as the taxable owner of the interest on the money. The petitioner also appears to have transferred all of the money to a new account in December without the need for anyone else's permission and to have solely directed its retitling and disbursement to his grandson. These facts are consistent with ownership of the money of the account.

While there is little reason to doubt the intent of the petitioner in this matter, he did not take legal actions which would remove the account from his ownership and control and he continued from time to time to use the account as if it were his. The facts of this case are very similar to those in Fair Hearing No. 8501 wherein the Board found that funds from a child's personal injury settlement were still available to the family because they could still be accessed for the child's general welfare although the mother had intended to preserve the funds for the child's adult use. The Board in that case advised the mother that she should take immediate action to legally effectuate her true intention and that such action would not be considered an illegal transfer so as to make her ineligible for benefits. Although the result was harsh, the Board felt constrained to uphold it because in spite of her intent, the money was sitting there easily accessed and could have legally been used for the welfare of the family. To treat resources differently from similar resources of other families applying for benefits simply because of the subjective intent of the owner, which could be changed without notice at any time, is simply unfair and violates the regulations.

The petitioner has his remedy in legally effectuating his intent which he has done with the able and thorough assistance of his counsel. He has now been found eligible for benefits. It cannot be found, however, that he was

eligible at any time before the money was transferred to his grandson on December 14, 1991. Therefore, the Department's decision should be affirmed.

FOOTNOTES

[1]The regulation at 7 C.F.R. э 273.8(e)(8) is identical to the first sentence of F.S.M. э 273.8(e)(8) cited above.

[2]The parties have not for purposes of this appeal explained what legal differences exist between the old and the new account titling. The hearing officer presumes that the general difference is that the grandson through the transfer obtains a property right in the account which he did not have before.

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